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No. 89-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF ALBEMARLE, VIRGINIA,
Petitioner,

v.

WILLIAM S. SMITH, *et al.*,
Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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22

QUESTION PRESENTED FOR REVIEW

Whether the lengthy display of a solitary, unattended Christian Nativity Scene on the public forum lawn of the County Office Building violates the Establishment Clause of the First Amendment of the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

Except as otherwise explained below, the Respondents adopt the statement of the case of the Petitioner. The following discussion, in part, complies with Supreme Court Rule 15.1(A)'s requirement to bring to the Court's attention any ". . . perceived misstatements of fact . . ." in the Petition.

On December 2, 1987, the Charlottesville-Albemarle Jaycees made an oral presentation to the members of the Petitioner's Board of Supervisors in support of its application to use the front lawn of the Albe-

marle County Office Building as the location for its Christian Nativity Scene (hereinafter called creche). In explaining the legal status of the front lawn, the County Attorney, Counsel of Record for Petitioner in this case, explained to the supervisors that, by allowing the creche, they would be creating a public forum.[1] This is in stark contrast to Counsel for Petitioner now arguing before this Court that, ". . . the location of the private display was in an open public forum that had been used on numerous occassions in the past for social, commercial, religious, artistic and political expression and other privately sponsored events." Petitioner's Brief, p. 8.

The Albemarle County Office Building had been in this location for only six years prior to the display of this creche. Prior to 1981, the building been the home of Lane High School. There is no evidence, nor argument from either party, that the front lawn was a public forum prior to the County's occupancy of the building in 1981.

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[1] "I think his concern as to the precedent this will set for future decisions is really the only legal concern you have here. . . . To my knowledge that particular corner has not been used for a purpose like this before. And if we use it for this purpose now, then what you will have done is what the courts call 'dedicated as a public forum.' That's not the same as dedicating a road or anything. It just becomes a precedent. You have allowed that place to be used by members of the public for religious or other purposes, and therefore you couldn't exclude someone who wanted to have some other symbol like that. This is a symbol, and if somebody else wanted some kind of political symbol or religious symbol, or whatever symbol they want, you're going to have to find some distinction, some factual distinction, in order to tell the next people 'We're sorry, but you can't do this.' " Appendix to Respondent's District Court Memorandum of Law, p. A-10, 11.

Furthermore, in the six short years between 1981 and 1987, the front lawn had ". . . been used sporadically for occasional activities: a beauty pageant, a billboard for the United Way, two Easter Sunrise services, several assorted weddings, municipal band concerts, and a civil rights demonstration." Petitioner's Appendix, p. 22a. Hence the lawn had only been used for "religious" purposes on two occasions, those being Easter sunrise services, lasting only a couple of hours, and only sporadically on a few other occassions for events of varying lengths of time.

In its December 2, 1987 meeting, the Board of Supervisors approved the placement of the creche at the requested location. However, in contrast to Petitioner's statement that the County's approval was ". . . subject to . . . placement by the Jaycees of a disclaimer sign to eliminate any misunderstanding about County involvement," the Supervisors never required nor even discussed any disclaimer. Petitioner's Brief, p. 5; Appendix to Respondent's District Court Memorandum of Law, p. A-8 - A-13.

The creche remained at this location, one of the busiest intersections in Charlottesville, for a continuous period of five weeks, December 6, 1987 through January 10, 1988. It was continuously lit at night, exposing it to view 24 hours a day. It covered an area of approximately 500 square feet, contained holy figures approximately seven feet tall, a manger approximately nine feet tall, twelve feet deep, and twenty feet wide, and at the time of its erection, was not accompanied by any explanatory sign or disclaimer. Appendix to Respondent's District Court Memorandum of Law, p. 76. Immediately prior to,

during and subsequent to the display of the creche, there were no other symbols of the holiday season whatsoever, religious or otherwise, present on the lawn. Petitioner's Appendix, p. 92a - 93a. Finally, the creche sat directly in front of the Albemarle County Office Building, the seat of County government, directly beneath the sight line of the words "Albemarle County Office Building" and flanked on either side by the American flag and the flag of the Commonwealth of Virginia. Petitioner's Appendix, p. 92a - 93a.

The first sign placed in front of the creche after its erection stated "Sponsored by Charlottesville Jaycees" and was 18 inches by 6 inches in size. After this lawsuit was filed, a "larger sign" replaced the first sign. There is nothing in the record indicating the size of the second sign. Petitioner's Appendix, p. 94a. Because of their size, distance from the intersection, and fact they were to be read from moving vehicles, both signs were illegible to the majority of observers of the creche. Petitioner's Appendix, p. 46a, 47a, 53a, 59a.

SUMMARY OF ARGUMENT

The Court of Appeals and District Court correctly determined the display of the instant creche in the location, manner and for the duration involved violated the Establishment Clause of the First Amendment. *County of Allegheny* v. *ACLU*, 109 S. Ct. 3086 (1989). Their decisions correctly applied the analysis and rationale of *Widmar* v. *Vincent*, 454 U.S. 263 (1981), to conclude that the least restrictive means to avoid an Establishment Clause conflict was to prohibit

the display of this creche from this location for this length of time.

There have been no decisions of this Court or any of the other circuits which conflict with the decision of the Court of Appeals in this case.

This case is not certworthy because of the recency of this Court's on-point decision in *Allegheny* and denial of certiorari in *Kaplan* v. *City of Burlington*, 891 F. 2d 1024 (2d. Cir. 1989), *Pet. for Cert. denied* No. 89-1625, June 10, 1990[2] , and because the result in each of this type of case turns exclusively on individual facts and therefore adjudication by this Court at this time would do nothing to establish helpful precedent for lower courts.

ARGUMENT IN SUPPORT OF THE DENIAL OF A WRIT OF CERTIORARI

I. The Fourth Circuit Court of Appeals decided this case directly in line, not in conflict with *Allegheny*, *Widmar* and the applicable decisions of other Circuit Courts.

The most recent decision of this Court bearing directly on the unconstitutionality of religious displays on public property occurred only last year in *Allegheny*. The Court held that the display of a creche in a nonsecular setting in the front hallway of the County Office Building violated the second prong of the test enunciated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971): the primary effect of its location, setting and duration constituted an unconstitutional governmental

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[2] *Kaplan*, to be referred to extensively throughout this brief, ruled unconstitutional the placement of privately-owned menorah in a public forum in a setting similar to the instant case.

endorsement of religion. In applying the precise rationale and analysis used by this Court in *Allegheny*, the Court of Appeals took note of this Court's admonition that the Establishment Clause is violated when a given governmental practice has the appearance or effect of endorsing religion. The Court of Appeals correctly found that the instant creche conveyed at least as strong a message of government endorsement as the *Allegheny* creche. Significant to the Court of Appeals was the instant creche's location on the otherwise unadorned front lawn of the Albemarle County Office Building without any other surrounding secular symbols or artifacts. The Court also noted the prominent wording identifying the building as the "Albemarle County Office Building" and the other strong indicia and aura of government. Hence, the Court of Appeals agreed with the District Court that ". . . the unmistakable message conveyed is one of government endorsement of religion—impermissible under the Establishment Clause of the Constitution." Petitioner's Appendix, p. 11a.

The Court of Appeals, as did the District Court, then discussed the precise facts to which the Petitioner argues those Courts gave short shrift: the instant creche is privately owned and was placed in a public forum. Both Courts correctly acknowledged that the starting point for determining whether the message of endorsement is constitutionally mitigated by its private ownership and placement in a public forum is this Court's decision in *Widmar*.[3] The Court

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[3] In *Widmar*, this Court decided that a state University which has an open access policy to its student activities rooms must apply that policy to religious groups as well or it may violate those groups' free speech and association rights.

laid out a method of analysis and resolution of this seeming conflict between the Establishment and speech clauses of the First Amendment, which analysis has been confirmed and reapplied by this Court, the Court of Appeals and District Court in this case, and many other courts in related cases: private speech activities from a public forum may only be restricted by reasonable time, place and manner restrictions or by narrowly tailored restrictions responding to a compelling state interest. This Court clearly recognized in *Widmar* and subsequent cases that the government's necessity to be free from violations of the Establishment Clause is such a compelling state interest. In applying this analysis to the instant facts, the Court of Appeals and the District Court correctly concluded they must restrict the Jaycees' right of symbolic speech in this case because of the overwhelming message of government endorsement the speech created.

Both Courts acknowledged the existence of the second sign in front of the creche, but agreed it was impotent in mitigating or removing the cloud of government endorsement of religion. The Court of Appeals stated:

> The relatively small size of the disclaimer, however, in relation to the whole of the display, mitigates its value. It remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion. In effect, such an aura defeats Albemarle County's attempt to argue for a remedial measure short of total removal of the creche. (Petitioner's Appendix, p. 11a.)

The Petitioner clearly overstates the effect and importance of the single small sign in the instant case. This Court has already recognized that such a disclaimer is of no use in overcoming such an overwhelming message of governmental endorsement.[4] In line with this Court and other Circuit Courts, the District Court found as a factual matter that this creche's overwhelming message of government endorsement was not mitigated by the sign:[5]

> In analyzing this creche under the effect prong of the Lemon test, one other feature merits mention. A series of disclaimer signs were erected around the creche, at first one quite inconspicuous and then a second disclaimer sign somewhat less inconspicuous. The presence of even this relatively larger disclaimer sign cannot undercut the endorsement that is apparent. The larger disclaimer sign is still rather small and not easily read. Drivers cannot easily read the disclaimer while passing the scene, the intersection is

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[4] "While no sign can disclaim an overwhelming message of endorsement, an 'explanatory plaque' may confirm that *in particular contexts*, the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs." *Allegheny*, 109 S. Ct. at 3114 (emphasis added).

[5] See also, *Kaplan* at 1029, n. 5: "Even if this display had been accompanied by an express disclaimer of City sponsorship and approval, the pervasive message of government endorsement communicated by this context would not be negated. City Hall is closely identified with this particular city park, as its very name and proximity to the seat of municipal authority suggest. In these circumstances, 'a disclaimer of the obvious is of no significant effect.' " *American Jewish Congress*, 827 F.2d. at 128 (citation omitted).

busy, and it is hardly possible to park or to stop and read the disclaimer with the care that would be necessary. Thus, the setting and the potential effect of disclaimers is quite different in this case than in *Allen* v. *Morton*, where that District of Columbia Circuit Court of Appeals identified the possibility of revised disclaimers as mitigating the threat to the establishment clause. 495 F.2d 65, 90-91 (D.C. Cir. 1973). In *Allen*, the display was within a park with ample pedestrian walkways and far more opportunity for those viewing the display to read and assimilate its intended message of dissociation. (footnote 17) Id. at 78-79.

17 This is not to suggest that, were there more pedestrian access to and pedestrian traffic past the creche on the front of defendants' lawn accompanied by signs which would attempt more effectively to disclaim government sponsorship of the display, then the display necessarily would have been able to avoid its difficulties under the effect prong of the Lemon test.

If the setting in this case [had] been more similar to that described in *Allen*, the result would be the same, for even a readily discernible disclaimer would hardly have been sufficient alone. A larger sign, by itself, would not necessarily begin to undercut the strong aura of government endorsement. As the Seventh Circuit Court of Appeals found in (*American Jewish Congress* v.) *City of Chicago*, '[T]he message of government endorse-

> ment generated by this display was too pervasive to be mitigated by the presence of disclaimers.' 827 F.2d (120, 7th Cir. 1987), at 128. (Parentheses added) Petitioner's Appendix, p. 46a-47a.
>
> This court finds that, given the message of endorsement which is communicated by the relationship between the trappings of government and the creche with its religious connotations, no less restrictive alternative than removal of the creche would curtail and impermissible message of government endorsement. The impotence of the disclaimers attached to the creche only reinforces this conclusion. Petitioner's Appendix, p. 53a.
>
> In the case before us, the vividness of the message of endorsement and the concomitant ineffectiveness of the disclaimers show in stark terms the power of symbolic speech. Not only were the disclaimer signs relatively small, but the message of endorsement conveyed by the symbolic embrace of the creche by government simply overwhelmed any attempt to disclaim. Petitioner's Appendix, p. 58a-59a.

Simply stated, the Court of Appeals and District Court correctly found that one cannot disclaim the obvious.

Petitioner similarly overstates the significance of the creche's erection in this public forum. Initially, the Court of Appeals and the District Court correctly held that the location of the creche in a public forum was but one of many factors to be considered in de-

termining whether a message of government endorsement of religion was conveyed:

> Essentially, Judge Michael found that whether the lawn is or is not a public forum is not dispositive. The critical gauge of any such content-related speech restriction is whether the overall context and nature of the restricted display conveys the impermissible message of governmental endorsement of religion. Petitioner's Appendix, p. 11a (footnote omitted).[6]

Recognizing the nature of the public forum in the instant case was one of extremely short duration, was one located in the lap of and surrounded by the trappings of County Government, and was one that only sporadically had been used during its short life for assembly activities, the Court of Appeals agreed with the District Court that the creche's location in this public forum did little to mitigate the message of government endorsement.[7]

In short, because of the Court of Appeals' correct application of the analytical framework of *Widmar*,

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[6] See also, *Kaplan*, 891 F. 2d at 1029: "The existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement." (citing *Widmar*).

[7] Even though the Court of Appeals agreed with the District Court that the lawn was technically a public forum, it stated, "The front lawn, though used for such events as weddings and concerts, does not have the traditional indicia of a free speech forum associated with a public park." Petitioner's Appendix, p. 11a.

Allegheny, and *Kaplan*, the "head to head clash"[8] between the Speech and Establishment clauses is largely illusory in this case. The Court of Appeals simply prohibited the display of this creche displayed in this manner from this particular location while allowing other sporadic, short-term religious uses of the property to continue unabated (Easter sunrise services).[9]

Respondents' exhaustive research has uncovered only three Circuit Court cases addressing these issues since this Court's decision in *Allegheny*. The Courts' analysis and holdings in each of these cases fully supports the holding of the Court of Appeals in this case or is clearly distinguishable on the facts.

In *ACLU* v. *Wilkinson*, 895 F.2d. 1098 (6th Cir. 1990) the Court found that, under the facts presented, the display of a stable from the grounds of the state capitol did not violate the Establishment Clause. The Court was careful to distinguish its facts from those found in *Kaplan* and those concerning the creche in *Allegheny*; it more closely analogized its facts to those

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[8] Petitioner's Brief, p. 15. There is no intractable clash between the two clauses here because neither principal is absolute. See *Bowen* v. *Kendrick*, 108 S. Ct. 2562 (1988) (incidental aid to religious organizations is permissible) compared to *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) (reasonable time, place, and manner restrictions that may limit expression are valid) and *Widmar* (narrowly tailored restrictions on private speech which runs afoul of the Establishment Clause are required.)

[9] As the District Court stated, "This decision only involves what is at most a marginal or incremental geographic restriction on a certain type or display of symbolic speech. There is without question still an entire panoply of fora in the area for the type of religious speech which is at question in this case." Petitioner's Appendix, p. 60a.

involving the menorah in *Allegheny*. The crucial facts distinguishing *Wilkinson* from the instant case, and supporting a different result, albeit by a 2-1 decision, were as follows: The display was not a creche but was an empty rustic stable with no holy figures which itself could be used by any citizens or groups for any purposes, thereby significantly reducing its Christian religious message; the stable was surrounded by literally hundreds of other secular symbols of Christmas including lit Christmas trees, wreaths, lights, red ribbons around lamp posts and many holiday decorations on the capitol building itself; the land on which the stable sat had long been used and well-recognized as a public forum by the citizens of Kentucky; and, there was a large, meaningful, clear disclaimer sign announcing both the stable and the area surrounding it as a public forum and that the state in no way endorsed or supported any particular religion. Considering the total lack of any of the above facts in the instant case, it is clear the Fourth Circuit Court of Appeals correctly applied *Allegheny* and *Widmar* to reach the correct result in this case.

Most importantly, the Second Circuit's application of *Allegheny* to the facts before it in *Kaplan* is fully consistent with the Fourth Circuit's analysis and holding in the instant case. The Court of Appeals' decision in the instant case is even more strongly supported by the law than the Second Circuit's decision in *Kaplan* because the religious symbol there was a menorah, recognized by this Court in *Allegheny* as having less religious and more cultural significance than a creche and because the public forum involved in *Kaplan* was well-recognized as such.[10]

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[10] The third case was significantly less factually on point but

Petitioner argues the decision of the Court of Appeals conflicts directly with decisions from other circuits. It is sufficient to say that the cases cited by Petitioner (except for *Chabad* v. *City of Pittsburgh*, 110 S. Ct. 708 (1989), to be discussed in the next section of this brief) are all pre-*Allegheny* and pre-*Kaplan* and otherwise distinguishable on thefacts from the instant case.[11]

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nevertheless cited *Allegheny*. In *Foremaster* v. *City of St. George*, 822 F.2d 1485 (10th Cir. 1989), the Court considered whether the City's logo containing a picture of a Mormon church violated the Establishment Clause. Applying the rationale of this Court in *Allegheny*, the Court found that a genuine issue of material fact existed as to whether the primary effect of the logo conveyed a message of endorsement.

[11] *Allen* v. *Morton*, 495 F.2d. 65 (D.C. Cir. 1973) upheld the constitutionality of a creche displayed during the Pageant of Peace on the National Mall, a long-recognized public forum, when the creche was accompanied by several clearly stated disclaimer signs visible and legible by all who approached the creche. There were also other religious and non-religious displays on the Mall at the same time.

In *O'Hair* v. *Andrus*, 613 F.2d. 931 (D.C. Cir. 1979), the Circuit Court upheld the constitutionality of a short mass by the Pope on this same long-recognized public forum.

McCreary v. *Stone*, 739 F.2d. 716 (2nd Cir. 1984) *affirmed by an equally divided court, sub. nom. Board of Trustees of Scarsdale* v. *McCreary*, 471 U.S. 83 (1985) was distinguished by the Second Circuit in *Kaplan*. The Court made clear that the location of the religious symbol in *McCreary*, a traffic circle owned by the city, was possessed of much less governmental aura than City Hall Park. The Court also felt this Court's opinion in *Allegheny* was a much clearer, doctrinally correct analysis of the issues than that previously used by the Second Circuit in *McCreary*.

II. There have been no cases decided by this Court since the decision of the Court of Appeals which support a grant of a writ of certiorari.

The Petitioner relies heavily upon Justice Brennan's Order vacating the stay of an injunction allowing *Chabad* to place its menorah outside Pittsburgh City Hall. *Chabad* v. *City of Pittsburgh*, 89-2432 (W.D. Pa., December 20, 1989); No. 89-3793 (3rd Cir., December 26, 1989); No. A-476, ___ U.S. ___, 110 S.Ct. 708 (1989). Again in its argument Petitioner leaves out significant facts and fails to recognize the standard of review utilized by Justice Brennan.

As Chabad itself argued, its menorah should be allowed because it was a part of a "combined holiday display."[12] Chabad also made an allegation, totally absent from the instant case, that the City's refusal to permit its menorah was in retaliation for Chabad's litigation.[13] Most importantly, there had been no decision on the merits in Chabad's latest case and Chabad's appeal put into issue only the District Court's grant of the Preliminary Injunction. Hence, the standard of review Justice Brennan applied was simply whether the Order of the District Court was an abuse of discretion. Petitioner's reliance on *Chabad* to support its request for the granting of certiorari is simply misplaced.

Petitioner also quotes dicta of this Court in *Westside Community Board of Education* v. *Mergens*,

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[12] Plaintiffs' Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, p 14, n. 6 (expressly distinguishing *Kaplan* on its facts).

[13] Plaintiffs' Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, p.2, 4-8.

___ U.S. ___ , No. 88-1597, 58 U.S.L.W. 4720 (June 5, 1990). One of the issues in *Mergens* was whether the Equal Access Act was unconstitutional if it allowed equal access to public high school classrooms by a bible study group. In holding the act constitutional, this Court simply extended the holding in *Widmar* to high schools. This Court affirmed its prior legal analysis used in *Widmar* and followed by the Court of Appeals and District Court in the instant case. However, as the Court of Appeals and District court explained, the *Widmar* analysis when applied to the facts of the instant case mandates a different result from *Mergens*: In *Mergens*, the forum involved was a typical public forum designed and widely recognized for the free exchange of ideas and used for that purpose by many other groups. Furthermore, the bible study group's use of the facilities would be out of sight of the public, for a short duration and would involve "active" speech, much less capable of public misinterpretation than the "passive" symbolic speech in the instant case.[14]

Finally, and most importantly, this Court considered and denied the City of Burlington's petition for a writ of certiorari in *Kaplan* on June 11, 1990, approximately one and a half months ago. Of all the cases cited by Petitioner and Respondent, *Kaplan* is most factually and legally on point with the instant case. As the Circuit Court found and previous argument has shown, the facts of the instant case constitute at least as strong a violation of the

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[14] See Court of Appeals' opinion at Petitioner's Appendix, p. 13a and District Court's opinion at Petitioner's Appendix, p. 52a.

Establishment Clause as *Kaplan*, thereby mandating a denial of Petitioner's request for a writ of certiorari.

III. Petitioner's request for a writ of certiorari should be denied for the additional reasons of the recency of this Court's pronouncements in *Allegheny* and *Kaplan* and secondly that the fact specificity of each of these "religious symbol on public property" cases radically diminishes their precedential value.

This Court has considered all the issues involved in the instant case during the past year in *Allegheny* and *Kaplan*. Both of these cases fully support the analysis, rationale and holding of the Court of Appeals that the display of the creche in the instant case constituted a clear violation of the Establishment Clause unmitigated by its location with a disclaimer in a public forum. Because this Court has so recently considered all the precise issues involved in this case, Petitioner's request for a writ of certiorari should be denied. Additionally, whether or not a violation of the Establishment Clause is found in any of these cases depends solely on the specific facts before the Court. Hence, especially in light of the recency of *Allegheny* and *Kaplan*, any decision by this Court on the merits will provide little, if any, guidance and precedent to lower courts at this time.

CONCLUSION

The Fourth Circuit Court of Appeals correctly applied the analysis and rationale of *Widmar*, *Allegheny* and *Kaplan* to the instant facts. Its decision protects the compelling interest of the County to be free from violations of the Establishment Clause while recognizing that certain religious "speech" may still be constitutionally permissible from certain public prop-

erty. The decision of the Fourth Circuit Court of Appeals does not conflict with any decisions of this Court nor with any decisions of any other circuit courts.

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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